***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

# 76-6093

## United States Court of Appeals

**FOR THE SECOND CIRCUIT**

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P/S

LE BEAU TOURS INTER-AMERICA, INC.,

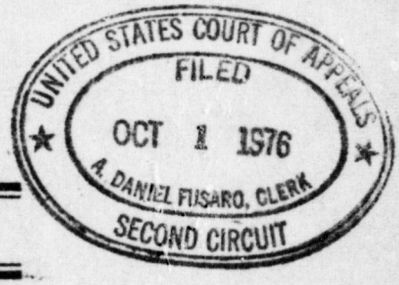
*Plaintiff-Appellant,*

*against*

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK




**REPLY BRIEF FOR PLAINTIFF-APPELLANT**

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TABLE OF CONTENTS

# TABLE OF AUTHORITIES CITED

Statutes:



Cases:



Article

POINT I. - ERROR IN DEFENDANT'S STATEMENT OF FACT

Taxpayer does not engage essentially in the same activities as Tours (See Appellee's Brief, p.2). Taxpayer's activities are limited to WHTC activities. (A 14)

POINT II. - TAXPAYER IS NOT ENGAGED IN THE SALE OF PERSONAL PROPERTY

Defendant's so-called Alternative I (Appellee's Brief, p.5) is absurd. It has been rejected by the District Court [1] and merits no lengthy discussion. It stems from the fact that Internal Revenue Service income tax return Forms 1120 (A 17, A 21, A 25) provide in Line 1 for a listing of "gross sales." The fact that the preparer of the tax returns was tied to the Procustean bed of the Treasury forms does not indicate that taxpayer was a merchandiser of personal property. A merchandiser has inventory and must report this in Schedule A of Form 1120, as stated in Line 1 thereof. Taxpayer's tax returns left Schedule A blank (A 18, A 22, A 26) and at Line 2 which refers to cost of "goods", the preparers of the returns inserted the phrase "cost of income". (A 17, A 21, A 25).

POINT III. - COMM. V. PIEDRAS NEGRAS BROADCASTING CO. IS NOT DISTINGUISHABLE

The government, on page 10 of its brief, seeks to impeach the analogy between the present case and Piedras Negras, 127 F.2d 260 (CA-5, 1942) on the ground that the

(1) The District Court opinion is now reported at 415 F.Supp. 48 (1976)

solicitation of customers in the U.S. is an income generating factor for taxpayer. If the law were dealing with abstract philosophical causation, this argument might have merit and might defeat the taxpayer. However, the law deals with the actualities of the real world. The WHTC benefits are not denied to an exporter just because the exported goods have been manufactured by the exporter's parent or affiliate within the United States, even though from the viewpoint of abstract philosophical causation it could be said that the manufacture within the U.S. has substantially contributed to the "generation" of the exporter's income (see pp. 8,14 of our main brief).

Moreover, the government mistakenly assumes that taxpayer is compensated for services rendered "on behalf of the foreign hotels and ground operators." (p.11, Appellee's Brief). It is true that the foreign hotels and ground operators pay commissions for the services of taxpayer. However, the taxpayer's principals are the American tourists for whom taxpayer acts as purchasing agent and to whom it renders its services. The fact that the compensation is paid by the foreign parties is immaterial, (see pp.17-19, 12-13 of our main brief). It is established that for purposes of the source of income test of Sec. 921 IRC, it is irrelevant who the payor of the income is (see p.13 of our main brief). What counts is where and how the income was earned (Point V of our main brief). The analogy to Helvering v. Boekman, 107 F.2d 388 (C.A.-2, 1939) which the government suggests, is wide of the mark because the income in that case was derived

from compensable services rendered in New York City.

It must be borne in mind that in the instant case taxpayer would not have an opportunity to render compensable services as purchasing agent for American travelers, if taxpayer did not solicit employment as such purchasing agent. Such solicitation does not constitute compensable services, as the government erroneously assumes.

POINT IV. - THE ALLOCATION METHOD USED BY THE DISTRICT COURT WAS ERRONEOUS

Contrary to the statement in the footnote at page 12 of the government's brief, we submit that the District Court erred in allocating any part of taxpayer's income to sources within the United States. We refer to Point II of the Argument at p. 6 of our main brief.

POINT V. - TAXPAYER IS ENTITLED TO SUMMARY JUDGMENT IN ITS FAVOR

In Point II of its Argument, the government asserts that, in any event, it is entitled to a trial on the alleged claim that taxpayer is a sham corporation. This is a specious argument. It is based on several serious errors.

The District Court stated: "For the purposes of this motion, the Government is not pressing the sham corporation claim, which both parties agree, raises factual questions inappropriate for summary judgment" (A 57-58) The government did indeed assert to the Court below that it wished to preserve its alleged right to try the

alleged sham issue. However, taxpayer never agreed that such issue and such right to a future trial existed. The Record shows that the taxpayer's counsel in a letter of July 25, 1975, suggested that if the government knew of any such additional facts pertaining to sham, it should reveal them (A 52). In its responsive letter of July 29, 1975, the government declined to do this (A 54). However, in a subsequent affidavit of September 9, 1975, the Assistant United States Attorney was more specific (A 51). The government there asserted that to prove sham the government wished to depose the officers of plaintiff and the foreign tour guides "whom we contend are not employees (of plaintiff)". The government expressed particular interest in examining the officers "because the issue of sham depends on a determination of intent." (A 51)

The taxpayer has conceded and stipulated that the intent of the officers was to avoid income taxes as allowed by Sec. 921 seq. IRC (A 44). Besides, the officers of taxpayer offered to submit to an examination before trial by the United States Attorney, but the United States Attorney declined to accept that offer (A 14).

As to the tour guides, taxpayer has stipulated that these guides were employees of the foreign ground operators and not taxpayer's employees (A 45). Under Rule 56 (e) a party opposing a motion for summary judgment must specify facts showing that there is a genuine issue of fact. There

is a complete absence of such specification on the part of the government. It is obvious that the government seeks to avoid summary judgment for taxpayer "with the hope that something can be developed at trial in the way of evidence to support" its sham allegations. The foregoing phrase is borrowed from First National Bank of Arizona v. Cities Service Co., 391 US 253, 290 (1968) reh. den., 393 US 901 (1968), aff'g 361 F.2d 671, (CA-2, 1966) where this Court declined to order a full dress trial in the absence of any significant evidence of a triable issue of fact. (See also Radio City Music Hall Corp. v. U.S., 135 F.2d 715 (CA-2, 1943) and Perma Research & Development Co. v. The Singer Company, 410 F.2d 572 (CA-2, 1969).

Accepting the government's contention that the issue of sham depends on the determination of intent, it is significant that the government declined to examine taxpayer's officers, who are New York residents, even though the government had access to them, and, indeed, they voluntarily offered to submit to such examination. Obviously, the government did not expect and does not expect to elicit from the officers any fact which is unknown or unconceded.

The case of U.S. Gypsum v. U.S., 304 F.Supp. 627 (N.D. Ill., 1969) which the government cites (Appellee's Brief, p.14) and which was affirmed in part in 452 F.2d 445 (CA-7, 1971) reh. den. (1972) is entirely atypical and in no way analagous to the present case. It involved a situation where in order to take advantage of the WHTC benefit,

a taxpayer schemed to create a corporation which held title to exported merchandise for a "split second" (p.644 of 304 F.Supp.) in mid-air while the merchandise was dropped from a crane into the hold of a ship. The creation of such a corporation, for the purpose of holding split second ownership, the Court ruled, was a fake and lacked substance. At the same time, the Court of Appeals at p.451, expressly confirmed that it is not a sham if a taxpayer corporation is organized for the purpose of tax avoidance as is true of the present taxpayer. The lower Court at p.641 quoted Pfaudler(2) to the same effect.

In the instant case, there is no unresolved factual question which would justify a full dress trial; all material facts are stipulated. Parenthetically, it seems worth noting that the stipulation of facts was arrived at after the United States Attorney had conducted a thorough search of taxpayer's records on taxpayer's premises in the presence of its officers.

As documented in our main brief (p.26), the government frequently cries "sham" when confronted with a claim for WHTC benefit.

In response, A. P. David comments:

> "It is not at all clear what exactly would constitute a sham, as in all cases

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(2) Comm. v. Pfaudler Inter-American Corp., 330 F.2d 471 (CA-2, 1964), cited in Appellee's Brief at p. 7

> which followed Barber-Greene and A. P. Green in which the test was invoked, Pan American Eutetic Welding Alloy Co., Comm. v. Hammond Organ Export Corporation and Comm. v. Pfaudler Inter-American Corporation, the taxpayer won." (3)

In the instant case, too, the sham issue is contrived and unreal. It does not rise to the dignity of a genuine issue for trial which would prevent summary judgment under Rule 56.

As Judge Kaufman said for this Court in Community of Rocquefort v. Faehrendrich, Inc., 303 F.2d 494 (CA-2, 1962) at p. 498:

> "We are well aware of the dangers involved in haphazard use of summary judgment procedures. However, summary judgment cannot be defeated where there is no indication that a genuine issue of fact exists; to permit that would be to render this valuable procedure wholly inoperable and to place a 'devastating gloss' on the rule."

We find the same attitude expressed in Radobenko v. Automated Equipment Corp., 520 F.2d 540 (CA-9, 1975) in which the Court stated at p. 544:

> "The very object of summary judgment is to separate real and genuine issues from those that are formal or pretended, so that only the former may subject the moving party to the burden of trial. ... Here we are convinced that the issues of fact created by Radobenko are not issues which this Court could reasonably characterize as genuine; rather, they are sham issues which should

(3) The Western Hemisphere Trade Corporation, 10 Harvard Int'l L.J. 101, 123 (Winter, 1969). (All cases contained in this quote are cited in our main brief).

not subject the defendants to the burden of a trial."

"To require this case to go to trial in the absence of a scintilla of proof to support plaintiff's claim would make a shambles of Rule 56." (4)

## CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND SUMMARY JUDGMENT SHOULD BE GRANTED TO TAXPAYER-APPELLANT.

Respectfully submitted,

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Frank G. Opton
Of Counsel

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(4) Applegate v. Top Associates, Inc., (Weinfeld, J.), 300 F.Supp. 51, 53 (S.D.N.Y. 1969), aff'd 425 F.2d 92 (2d Cir. 1970).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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|---|---|
| LE BEAU TOURS INTER-AMERICA, INC., Plaintiff-Appellant, -against- UNITED STATES OF AMERICA, Defendant-Appellee. | Docket No. 76-6093 CERTIFICATE OF SERVICE |

It is hereby certified that service of two copies of Appellant's Reply Brief has been made on counsel for the Appellee on this 1st day of October, 1976, by mailing a copy thereof to him in an envelope, with postage prepaid, properly addressed to him as follows:

Robert B. Fiske, Jr., Esq.
United States Attorney for the
Southern District of New York
1 St. Andrews Plaza
New York, N.Y. 10007

DAVID WERCHEN
Attorney

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ **Certification By Attorney** certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ **Attorney's Affirmation** shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is

Check Applicable Box

☐ **Individual Verification** the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ **Corporate Verification** the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ **Affidavit of Service By Mail** On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ **Affidavit of Personal Service** On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath

Docket No. 76-6093

INDEX NO. -19

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

**LYNTON KLEIN OPTON & SASLOW**

*Attorneys for*

*Office and Post Office Address*

**100 Park Avenue**

**Borough of Manhattan** **New York, N. Y. 10017**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

**LYNTON KLEIN OPTON & SASLOW**

*Attorneys for*

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**Borough of Manhattan** **New York, N. Y. 10017**

To

Attorney(s) for

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LE BEAU TOURS INTER-AMERICA, INC.,

Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee.

CERTIFICATE OF SERVICE

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Service of a copy of the within

is hereby admitted.

Dated, N. Y., 19

Attorney for